Supreme Court, U.S.
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No. 98-807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KMART CORPORATION, as Named Fiduciary of the Kmart Corporation Master Welfare Benefit Plan,

Petitioner,

vs.

DAVID SCHLEIBAUM, SANDY SCHLEIBAUM and JUDITH KIMMERLING,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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OPINIONS BELOW

In addition to those opinions identified in the Petition, the Entry on Remand from the Court of Appeals of the United States District Court for the Southern District of Indiana dated December 3, 1998 is unreported and is reprinted herein in Appendix B, *infra*. This opinion was issued after the Petition was filed.

REPLY TO THE BRIEF IN OPPOSITION

In reply to Respondents' Brief in Opposition to the Petition, three points warrant this Court's attention. First, Respondents' Brief only highlights the confusion among the Courts of Appeals over the remedies available for a statutory violation of ERISA. While Respondents' presentation of the issues and their associated arguments are difficult to follow, Respondents' core position is that where a statutory violation is at issue, the courts are not required to adhere to ERISA's carefully integrated remedial scheme. As Respondents' Brief confirms, they rely solely on what can properly be characterized as a deviant line of decisions, identified in the Petition, that gave rise to the current state of confusion and conflict on this vital ERISA remedies issue.

Second, we note that, since the Life Plan Administrator filed its Petition, the district court that originally heard the case here reluctantly awarded Respondents monetary damages as directed by the Seventh Circuit majority opinion in the face amount of the $260,000 life insurance policy, in contravention of ERISA's remedial scheme. (Reply App., *infra*, at 5a-6a, 8a). The district court did so after reviewing and relying on the new evidence produced by Respondents at trial, evidence that the Life Plan Administrator has not, to this day, been given the opportunity to review despite the discretion entrusted to it by

the Life Plan, and despite the fact that the Life Plan Administrator was merely the payer of premiums and not an insurer. (*Id.*, at 6a-8a, 26a). In so ruling, the district court opined that the Life Plan Administrator's "rational response" to this outcome "would simply be to amend [the] benefit plan to remove the life insurance premium waiver as a disability benefit." (Reply App., *infra*, at 11a). Accordingly, as the district court acknowledged and as the Petition forewarned, the award ordered by the Seventh Circuit majority not only operated to punish the Life Plan but conceivably to punish future plan participants and beneficiaries.

Third, we must point out that, unfortunately, Respondents' Brief in Opposition has substituted name-calling and over-reaching hyperbole for advocacy grounded in the record and the holdings below. Their Brief is rife with unsupported allegations that the Life Plan Administrator engaged in "misrepresentations." Those accusations are neither warranted by the facts, as Respondents' own discussion reveals, nor are they consistent with a thoughtful statement of position appropriate to proceedings before this Court. Respondents' attack on the Life Plan Administrator's factual presentation distracts attention from the reason why a writ is warranted here: the widening conflict among the Courts of Appeals regarding the remedy for a plan administrator's statutory breach. Moreover, Respondents' *ad hominem* attack misses the mark. This case is about — and only about — a straightforward Section 503 violation and the remedy therefor. No court has found that the Life Plan Administrator did anything else wrong. Consequently, references to other alleged misconduct or misunderstandings, such as Mr. Schleibaum's supposed ignorance of the qualifying standard for the permanent and total disability benefit under the Life Plan, are not only untrue or

unsupported by the record — they are also irrelevant.[1] The evidentiary record and factual findings in the courts below squarely present for resolution by the Court the Section 503 remedy issues raised in this Petition.

A. Respondents' Brief in Opposition sharply focuses the primary issue before this Court, which is the individual relief available for a statutory violation of ERISA. Respondents insist that the lower courts were free to award them monetary relief (the face value of the life insurance policy) for a Section 503 violation — clearly a *statutory* violation — even though such individual relief is authorized *only* under Section 502(a)(1)(B), which addresses *contractual* violations of the benefit plan itself. On the other hand, Respondents argue that Section 502(a)(3) has nothing to do with Section 503 violations, even though that provision — and only that provision — defines the remedies available for statutory violations. In support of their position, Respondents rely on the deviant line of decisions that, like the Seventh Circuit majority opinion here, essentially hold that ERISA's cautiously designed remedial scheme can be thrown to the wind should the statutory violation raise the possibility of some sort of undefined substantive harm.

Respondents first attack the Petition by asserting that this Court's opinions on which the Life Plan Administrator relies — *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and *Varity Corporation v. Howe*, 516 U.S. 489 (1996) — involved fiduciary, not statutory, breaches. This argument misses the

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1. For example, Respondents imply that the Life Plan's definition of permanently and totally disabled was somehow manufactured, stating that the Rule of Administration containing the definition was not adopted until after the Life Plan Administrator's initial denial of Mr. Schleibaum's claim. (Brief in Opposition, at 6). As the district court held, the Life Plan Administrator consistently had used the definition prior to formally appending it to the Life Plan as a Rule. (App., at 43a).

point. The remedial provision at issue in *Mertens* and *Varity Corp.*, Section 502(a)(3), encompasses *all* statutory violations. *See, e.g., Spinelli v. Gaughan*, 12 F.3d 853, 857 (9th Cir. 1993) (Section 502(a)(3) provides the sole remedy for violation of ERISA Section 510's bar on discriminatory conduct).[2] Fiduciary breaches are usually themselves a form of statutory violation, given that the duties owed by an ERISA fiduciary are prescribed by ERISA itself. Thus, the issue here, as it was in *Mertens* and *Varity Corp.*, is the type of individual relief available when the breach is statutory, rather than contractual. Because Section 502(a)(3) encompasses all statutory breaches, *Mertens* and *Varity Corp.* are not only relevant, they are crucial to understanding and resolving the issues raised in the Petition.

Respondents alternatively contend that "statements in *Mertens* as to any issue other than the one at issue in the case are dicta," citing this Court's opinion in *Lockheed Corporation v. Spink*, 517 U.S. 882 (1996). (Brief in Opposition, at 13). In *Lockheed*, this Court observed only that ERISA Section 406(a), 29 U.S.C. § 1106(a), which categorically prohibits fiduciaries from engaging in certain transactions, was not at issue in *Mertens* so that statements regarding that provision were dicta. 517 U.S. at 889 n.3. In contrast, Section 502(a)(3) *was* the issue in *Mertens*.

Respondents' next argue that the statutory violation in question here is somehow different because it caused "substantive harm" — *viz.*, that it denied a benefit (the face value of the life insurance policy) in violation of the Life Plan terms. This argument not only runs headlong into *Mertens* and decisions applying *Mertens*, it is contrary to the opinions below in the instant case. Neither the Seventh Circuit majority nor

2. The narrow exception to this broad coverage is found in ERISA Section 502(a)(1)(A), which is clearly not applicable here. (*See* App., at 63a).

the district court held that the Life Plan Administrator's Section 503 violation caused substantive harm. Indeed, the majority opinion held only that the Life Plan Administrator's statutory notice violation "may have led to a substantive harm." (App., at 17a).

Several Courts of Appeals following *Mertens* have found that a monetary remedy simply is not an available option, regardless of whether substantive harm has occurred. In *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376 (9th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1823, 137 L. Ed. 2d 1030 (1997), the plan administrator's notice violation (failing to notify the plaintiff of her eligibility for cancer coverage) resulted in a denial of coverage and imposed on the plaintiff a substantial financial burden when she was diagnosed with cancer only two months later. Similarly, in *Bast v. Prudential Insurance Company of America*, 150 F.3d 1003 (9th Cir. 1998), a fiduciary's failure to properly process a claim resulted in denying a life-saving procedure to a dying woman. After her death, her family sought, as a form of restitution or disgorgement, a monetary sum equivalent to the amount that the plan would have paid for the procedure. In both cases, the Ninth Circuit held that the requested remedies were not available under Section 502(a)(3) because the damages sought, being monetary equivalents, were no more than the money damages that *Mertens* declared are not an available remedy. *See also Fraser v. Lintas: Campbell-Ewald*, 56 F.3d 722, 725-26 (6th Cir.) (Even where substantive harm exists, if the only issue is a statutory failure to provide notice, a monetary remedy constitutes the very non-statutory relief that is not available under ERISA), *cert. denied*, 516 U.S. 975 (1995); *Lee v. Burkhart*, 991 F.2d 1004, 1011 (2nd Cir. 1993) (ERISA does not provide monetary remedy for notice violations, "[d]istasteful as it is to conclude that people who prudently secured insurance may be left nevertheless exposed to the risk" of substantive harm).

As set forth in the Petition, there are several decisions that have followed a deviant approach that allows a monetary remedy for a statutory violation if the monetary remedy would serve "some useful purpose." *See* Petition, at 17. *See also McKenzie v. General Tel. Co. of California*, 41 F.3d 1310, 1315 (9th Cir. 1994) (suggesting that a court could award monetary remedy for statutory notice violation), *cert. denied*, 514 U.S. 1066 (1995); *Schaub v. Consolidated Freightways, Inc. Extended Sick Pay Plan*, 895 F. Supp. 1136, 1145-46 (S.D. Ind. 1995) (court has discretion in fashioning remedy for statutory violation, including fashioning of make-whole relief). As with the Seventh Circuit majority's opinion below, these courts have not even paid lip service to *Mertens* or to ERISA's carefully integrated remedial scheme.

Respondents' reliance on the deviant line of decisions that ignore ERISA's remedial scheme to dispense some form of extra-statutory justice only buttresses the merit and urgency of this Petition. Because the notice requirement imposed on the Life Plan Administrator was imposed solely pursuant to *statute* (rather than by the *plan*), the *only* remedies available were those identified by Congress as applicable to statutory violations, *viz.*, the traditional equitable remedies of Section 502(a)(3).

B. Respondents next contend that remand to the Life Plan Administrator was not required despite the fact that the Seventh Circuit majority and the district court relied on evidence of other medical conditions that were unknown to the Life Plan Administrator when it rendered its decision. (App., at 7a, 16a; Reply App., *infra*, at 6a-7a). Remand, say Respondents, would be a useless formality and would be detrimental to the interests of ERISA because it would somehow allow the Life Plan Administrator to "reap the benefits" of its statutory violation. (Brief in Opposition, at 20).

No response is necessary other than to note that Respondents' position misconceives the futility doctrine and would preclude remand in virtually every case. The "useless formality" standard applies only where there is no new evidence, *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992), or where the new evidence does little to advance a plaintiff's case, *Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 394 (7th Cir. 1983). Alternatively, the standard has been applied where the facts clearly establish that the participant *beyond question* actually qualified for the benefit under the plan terms, or possibly where the evidence established that the plan administrator had acted in bad faith, *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2nd Cir. 1995).

None of these permutations was present below. Indeed, the new evidence undeniably advanced Respondents' position in the eyes of the courts below to the point that both courts found in Respondents' favor because of it and nothing more. While the district court opined that the Life Plan Administrator "made it clear" that it would not grant the benefit without some *other* kind of new evidence (App., at 54a-55a), the Life Plan Administrator has never been given the opportunity to evaluate the new evidence that the lower courts found so compelling. Nor has bad faith ever been found by the courts below, notwithstanding Respondents' generalized rhetoric. Essentially, Respondents argued for, and the Seventh Circuit majority granted, an extension of those deviant opinions that permit *de novo* review of a plan administrator's decision even where that decision is entitled to deference.

C. Finally, although Respondents incorrectly suggest otherwise (Brief in Opposition, at 19-20), the courts below recognized that the Life Plan Administrator had never received notice of Mr. Schleibaum's medical conditions other than the hip surgery for which he had sought the permanent and total

disability benefit under the Life Plan. (App., at 7a-8a, 44a). When a plan administrator is not even placed on notice of other medical conditions, it is unreasonable, unworkable, and economically impossible to require the plan administrator to anticipate and investigate a claim beyond the plan's normal claims processing procedures. In Mr. Schleibaum's case, the Life Plan Administrator followed its normal procedures and applied its considerable experience to interpret and rely on the opinions expressed by Mr. Schleibaum's treating physician. That physician, despite his admitted awareness of Mr. Schleibaum's other medical conditions, never mentioned these other conditions in his assessments, but rather rendered opinions that Mr. Schleibaum *was* capable of sedentary work. On that basis, the Life Plan Administrator *correctly* denied Mr. Schleibaum's claim. It was only after Mr. Schleibaum died (from causes other than his hip condition) that the physician opined that the other medical conditions might have called for a different assessment. The Life Plan Administrator has never had a chance to make that assessment because the courts below assumed that role.

Permitting judicial review of a plan administrator's decision in hindsight, as the majority opinion did here, will only create havoc in claims processing procedures and the litigation of those claims. As the district court held on remand, this standard may operate to benefit Respondents here, but it may be to the detriment of all other Life Plan participants. The allowance of a monetary award for a statutory violation could predictably result in the limitation or elimination of the benefit for all future participants and their beneficiaries (not only in the Life Plan here but in similar plans across the nation), a result that does not promote the interests of all participants and beneficiaries.

CONCLUSION

In conclusion, Respondents' Brief in Opposition has identified no reason for denying the Petition and, in fact, has only highlighted the important reasons for this Court to grant the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — FINAL JUDGMENT AFTER REMAND FROM THE COURT OF APPEALS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION DATED AND FILED DECEMBER 3, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 95-284-C H/G

DAVID SCHLEIBAUM, SANDY SCHLEIBAUM, and JUDITH KIMMERLING,

Plaintiffs,

v.

KMART CORPORATION, as named Fiduciary of the Kmart Corporation Master Welfare Benefit Plan,

Defendant.

FINAL JUDGMENT AFTER REMAND
FROM THE COURT OF APPEALS

The court having received the opinion and mandate from the United States Court of Appeals for the Seventh Circuit, as well as the entire record and the parties' post-appeal submissions, and having this day made its entry on remand from the Court of Appeals, it is hereby ORDERED, ADJUDGED, AND DECREED that defendant Kmart Corporation pay the sum of Two Hundred and Sixty Thousand Dollars ($260,000)

jointly to plaintiffs David Schleibaum, Sandy Schleibaum, and Judith Kimmerling, plus costs.

Date: December 3, 1998

s/ David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

APPENDIX B — ENTRY ON REMAND FROM THE COURT OF APPEALS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION DATED AND FILED DECEMBER 3, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 95-284-C H/G

DAVID SCHLEIBAUM, SANDY SCHLEIBAUM, and JUDITH KIMMERLING,

Plaintiffs,

v.

KMART CORPORATION, as named Fiduciary of the Kmart Corporation Master Welfare Benefit Plan,

Defendant.

ENTRY ON REMAND FROM THE COURT OF APPEALS

This unusual case is now back in this court's jurisdiction on remand from the United States Court of Appeals for the Seventh Circuit. See *Schleibaum v. Kmart Corp.*, 153 F.3d 496 (7th Cir. 1998). The Court of Appeals affirmed this court's ruling that defendant Kmart Corporation violated Glen Schleibaum's rights under the notice provision of ERISA, 29 U.S.C. § 1133. The Court of Appeals reversed this court's holding that Mr. Schleibaum's children were not entitled to compensation for this violation, and remanded to this court to

"exercise its equitable powers in fashioning an appropriate measure of damages." *Schleibaum*, 153 F.3d at 504. The Court of Appeals instructed:

> In determining the amount to award, the court should consider the likelihood that Mr. Schleibaum had a legitimate claim and would have been covered but for the fact that Kmart provided inadequate notice of the denial of the claim. The court should also consider the degree of fault to be assigned to Kmart for its failure to properly inform Mr. Schleibaum about how to perfect his claim in time for him to do so. Finally, the court should consider that Kmart's error was procedural in nature, but may have led to a substantive harm. This is a difficult calculus to apply in hindsight, given that we now know Mr. Schleibaum's health problems were serious enough to result in his death shortly after Kmart denied his claim. But deciding what is fair is the kind of assessment district courts must make every day.

Id. The Court of Appeals also directed this court to reconsider the denial of plaintiffs' request for attorneys' fees and costs and to apply the factors set forth in *Filipowicz v. American Stores Benefit Plans Committee*, 56 F.3d 807, 816 (7th Cir. 1995). See *Schleibaum*, 153 F.3d at 505.

Even before this court had received the mandate from the Court of Appeals, plaintiffs filed what they called a "Motion for Proceedings Consistent with Court of Appeals' Opinion," and defendant filed a brief in opposition to that motion. No party has asked this court to hear additional evidence, and the court is not aware of any available new evidence that might

clarify any of the issues. The parties have had ample opportunity to pursue settlement. After considering the parties' recent submissions, as well as the original evidence, in light of the Court of Appeals' mandate and opinion, the court will enter judgment in favor of plaintiffs for $260,000 plus costs, but without prejudgment interest and without attorneys' fees. As explained below, the court concludes that this judgment provides a fair and equitable resolution of this difficult and unusual dispute.

Plaintiffs ask the court to enter judgment for $260,000, the face value of the life insurance policy at issue here, plus prejudgment interest running from Mr. Schleibaum's death on September 10, 1993, plus a reasonable attorneys' fee and costs. In short, plaintiffs ask for complete victory. Defendant Kmart argues that the court should await disposition of its petition for a writ of *certiorari*. Kmart further argues that no remedy is available to plaintiffs, and that in any event no attorneys' fee should be awarded. Thus, Kmart also asks for complete victory.

The court sees no persuasive reason to delay the proceedings further awaiting disposition of Kmart's petition for a writ of *certiorari*. On November 9, 1998, Circuit Justice Stevens denied Kmart's petition for stay of enforcement of the judgment of the Court of Appeals. This court received the mandate of the Court of Appeals on November 20, 1998.

Much of Kmart's submission amounts to an argument with the Court of Appeals' decision. Kmart contends plaintiffs are not entitled to any effective remedy at all because an award of money is not available under ERISA for a "procedural" violation of 29 U.S.C. § 1133, as distinct from a proven denial of benefits subject to § 1132(a)(1)(B). Kmart's argument on

this point essentially invites this court to argue with the Court of Appeals. As far as this court is concerned, that argument is over. As the Seventh Circuit has explained recently: "The decision of a higher court controls whether the lower tribunal agrees or not. Appellate review is not an exercise in persuasion." *United States v. Sung*, 87 F.3d 194, 196 (7th Cir. 1996). The Court of Appeals considered the relationship between the procedural violation and possible substantive harm, and it directed this court to use its "equitable powers in fashioning an appropriate measure of damages." *Schleibaum*, 153 F.3d at 504; see also *id.* ("if Mr. Schleibaum was entitled to a continuation of his life insurance, then the appropriate remedy would be the face value of the policy").

Turning to the specific factors the Court of Appeals instructed this court to consider, the first is "the likelihood that Mr. Schleibaum had a legitimate claim and would have been covered but for the fact that Kmart provided inadequate notice of the denial of the claim." *Schleibaum*, 153 F.3d at 504. Taken as a whole, the evidence before the court indicates that the likelihood is high. Focusing first on Mr. Schleibaum's hip problems after his second hip replacement surgery on the same hip joint, Dr. Rosenberg said in 1992 that he did not think that Mr. Schleibaum would "ever be able to return to active employment other than that of the most sedentary kind," that Mr. Schleibaum would need a cane to walk at all times, and that he would "not be able to work under requirements of continuous sitting, standing or even intermittent walking." Ex. 14. Dr. Rosenberg's assessment did not take into account Mr. Schleibaum's additional medical problems. Those included other conditions which, especially in combination with the hip problems, substantially affected his ability to hold a full-time job. In 1988 Mr. Schleibaum had undergone an angioplasty

because of his heart condition. While on the job in the spring of 1991, he collapsed and was hospitalized for a blood clot in his neck, and thereafter he took blood thinning drugs. Critical to Mr. Schleibaum's employability, he had very limited stamina. He was about 5' 10" or 5' 11" tall and weighed between 285 and 300 pounds. Finally, there is no persuasive evidence that Kmart could have found a job that Mr. Schleibaum actually could have performed between November 1992 when the life insurance premium payment benefit stopped, and May 1993 when he suffered the stroke that eventually killed him. In making its decision to deny benefits, Kmart simply did not undertake any detailed analysis of Mr. Schleibaum's employability. Although the evidence cannot be conclusive, on the whole it tends to support the view that Mr. Schleibaum was "permanently and totally disabled" in the autumn of 1992 when Kmart made the decisions in question here. This court believes it is more likely than not that if Kmart had provided adequate notice of the reasons for its denial of continued benefits, Mr. Schleibaum could have shown he had a legitimate entitlement to continued life insurance premium benefits under the plan.

The second factor on remand is "the degree of fault to be assigned to Kmart for its failure to properly inform Mr. Schleibaum about how to perfect his claim in time for him to do so." *Schleibaum*, 153 F.3d at 504. That degree of fault is also high. This court explained in its original conclusions of law how Kmart violated the notice requirements of ERISA. The Court of Appeals agreed. Kmart initially denied the benefits in question on the basis of Dr. Rosenberg's report which, according to Kmart's employee benefits administrator Donald Morford, showed that Dr. Rosenberg did not understand the form. Kmart did not seek clarification or additional information.

Instead, it chose to assume that Dr. Rosenberg had understood the part of the form where his answer tended to show no eligibility, but had not understood the part of the form where his answer tended to show eligibility. Overall, Kmart's handling of Mr. Schleibaum's case also turned into an endurance contest, and Mr. Schleibaum eventually gave up after making reasonable efforts to obtain additional medical information.

The third factor for consideration is "that Kmart's error was procedural in nature but may have led to a substantive harm." *Schleibaum*, 153 F.3d at 504. The odds that the procedural error in fact resulted in substantive harm are relatively high because Mr. Schleibaum was in such poor health overall, in addition to the severe restrictions imposed by his hip problems. This court understands the Court of Appeals' decision to have rejected Kmart's contention that an award of damages is not appropriate as a remedy for the procedural violation in this case. A substantial award of relief is appropriate now as the only effective remedy for the procedural violation.

Plaintiffs have asked for substantive relief consisting of the face value of the insurance policy, $260,000, plus prejudgment interest since the day Mr. Schleibaum died, September 10, 1993. In an ordinary case of erroneous denial of benefits under ERISA, the Seventh Circuit generally presumes that prejudgment interest should be awarded. See *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696 (7th Cir. 1991), citing *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 236-37 (7th Cir. 1990), and *Gorenstein Enterprises, Inc. v. Quality Care – USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) (adopting presumption generally for "victims of federal law violations"). Prejudgment interest ordinarily is awarded to account for the time value of money.

Appendix B

Without interest, delayed payment is reduced payment. The rate of prejudgment interest is ordinarily the commercial prime rate for unsecured loans, with annual compounding of interest. See *Hizer v. General Motors Corp.*, 888 F. Supp. 1453, 1465 (S.D. Ind. 1995) (awarding interest under ERISA for delayed payment of life insurance proceeds), following *In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1290, 1332-37 (7th Cir. 1992).

In this case it is clear that the Court of Appeals concluded that plaintiffs are entitled to a substantial measure of relief, but the Court of Appeals did not simply instruct this court to award plaintiffs the complete measure of relief they have sought. Based on the high, but not 100 percent, probability that Mr. Schleibaum had a legitimate claim and the high share of fault attributable to Kmart with respect to the gaps in the information regarding Mr. Schleibaum's employability and medical condition, see *Schleibaum*, 153 F.3d at 504, the court concludes that an equitable resolution of this case is to award plaintiffs the face value of the life insurance coverage in question, $260,000, but without awarding the five years of prejudgment interest that presumptively would have accompanied a total victory. In effect, the court is denying prejudgment interest as an equitable (but admittedly rough) way to discount the damages based on the possibility that Mr. Schleibaum might not have been qualified for the benefit.[1]

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1. Plaintiffs have not provided interest information. As a rough approximation of the order of magnitude of this determination, if an average prime rate of 8.00 percent per year is assumed, with annual compounding at the end of each of five years, the original $260,000 would have grown to a total of $382,025.30, of which $122,025.30 would have been accumulated and compounded interest (about 32 percent of the total amount).

Appendix B

This court originally denied plaintiffs' request for an award of attorneys' fees because plaintiffs were not prevailing parties. Because plaintiffs are entitled to substantial relief on remand, the Court of Appeals instructed this court to reconsider the fee issue in light of: "(1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to satisfy personally an award of attorney's fees; (3) whether or not an award of attorney's fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions." *Filipowicz*, 56 F.3d at 816, cited in *Schleibaum*, 153 F.3d at 505.

Two factors tend to weigh modestly in favor of a fee award. First, Kmart presumably is financially capable of satisfying a fee award. Second, although the plaintiffs' success in this unusual case is unlikely to confer a substantial benefit directly on other plan participants and beneficiaries, it may provide indirect benefits by encouraging Kmart to improve its claim administration with respect to compliance with ERISA's notice requirements.

The other factors tend to weigh against an award of attorneys' fees in favor of plaintiffs. First, the court does not find that Kmart acted in bad faith. Its handling of Mr. Schleibaum's case was not a model of ERISA claims administration, but that is a far cry from acting in subjective bad faith. Second, and perhaps most important here, the court sees no need for a fee award as a deterrent in this case. The overall measure of damages — starting from the face value of the insurance policies in question rather than from the value of the premiums in question — is more than sufficient by itself to

produce a dramatic deterrent against similar violations, at least any in which the benefit in question is payment of insurance premiums. Under this court's ruling in compliance with the Court of Appeals' mandate, Kmart will pay damages of $260,000 to remedy a procedural error that inured to Kmart's benefit to the tune of no more than a few months' premiums on a life insurance policy. In fact, one rational response to the damages rule for cases like this one would simply be to amend a benefit plan to remove the life insurance premium waiver as a disability benefit (accompanied, one might hope, with continued eligibility for individual participation in life insurance with a modest increase in disability payments sufficient to cover individual premiums so the employee could continue coverage).

Third, and also very important in this case, the relative merits of the parties' positions are not at all lopsided here, at least with respect to the extent of an appropriate remedy in this case. In this judge's view, Kmart did not have a strong case on the merits, although the dissenting member of the Seventh Circuit panel disagreed. As to whether the remedy should be measured in terms of perhaps a few thousand dollars of insurance premiums under the conversion right available to Mr. Schleibaum, or in terms of several hundred thousand dollars in face value of the coverage, this court agreed with Kmart's contention that the measure of damages should be the premiums. This court viewed the issue in terms of the measure of damages for a breach of contract, which is ordinarily the difference between the contract price (here, zero dollars for Mr. Schleibaum) and the cost of "cover" in the market (the unspecified cost of premiums under the conversion right). The majority of the Seventh Circuit viewed the issue instead in terms of mitigation of damages and held that Mr. Schleibaum was

not obligated to mitigate his damages. Available precedent is scarce, as is evident from this court's opinion and the Seventh Circuit's opinion. Reasonable people and jurists can differ, and that factor tends to weigh against a fee award.

On balance, the weight is against a fee award here. The factors tending to favor a fee award are present in almost any successful ERISA case — the defendant can afford to pay a fee, and the judgment may result in indirect benefits to others by giving the defendant a reason to conform its conduct to law. The factors weighing against a fee award are more compelling and more specific to the merits and equities of this case.[2]

Conclusion

The result on remand does not give plaintiffs a complete victory, but a complete victory would not be equitable in light

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2. The Seventh Circuit has articulated the test for fee awards under ERISA in other ways. For example, last week in *Quinn v. Blue Cross & Blue Shield Ass'n*, __ F.3d __, __, No. 98-1360 (7th Cir. Nov. 25, 1998), the court set forth both the *Filipowicz* standard and a second test looking to "whether or not the losing party's position was 'substantially justified,' " citing *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 830 (7th Cir. 1984), and asserted that "both tests essentially ask the same question: 'was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?' " Slip op. at 11-12, quoting *Hooper v. Demco, Inc.*, 37 F.3d 287, 294 (7th Cir. 1994), quoting in turn *Meredith v. Navistar International Transp. Corp.*, 935 F.2d 124, 128 (7th Cir. 1991). This court has applied the *Filipowicz* standard, as the Court of Appeals specifically instructed in this case. The result would be the same if the inquiry were simply whether the losing party's position was substantially justified — it was — or if the inquiry were whether the losing party's position was substantially justified and taken in good faith — it was. In defending this case, Kmart was not "simply out to harass its opponents."

of the unknowns and uncertainties addressed by the Court of Appeals and by this court. Plaintiffs are nevertheless entitled to substantial relief. For the reasons set forth above, and in compliance with the mandate of the Court of Appeals, the court will enter judgment in favor of plaintiffs for $260,000.

Date: December 3, 1998

s/ David F. Hamilton
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana